No. 90-505

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CALIFORNIA PUBLIC UTILITIES COMMISSION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
and
BONNEVILLE POWER ADMINISTRATION,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' Brief in Opposition conclusively demonstrates how in the proceeding below Petitioner and the other parties from California were denied a meaningful opportunity to contest Schedules NF-1 and NF-2 established by the Bonneville Power Administration ("BPA") for the sale of nonfirm energy. Like the Federal Energy Regulatory Commission ("FERC") and the Court of Appeals earlier, Respondents failed even to address various points of fact and law critical to the review of those rates under Section 7(k) the Pacific Northwest Electric Power Planning and Conservation Act ("Pacific Northwest Act"), 16 U.S.C. § 839e(k). In particular, Respondents overlook (1) that the plain language of Section 7(k) authorizes the FERC to hold an evidentiary hearing; (2) that the purpose of Congress in enacting Section 7(k) was to protect California against the BPA's bias in favor of the Pacific Northwest; (3) that the BPA neither plans nor operates its system for the purpose of providing reliable

service to California; (4) that the FERC had in earlier decisions consistently rejected the assignment of fully-allocated costs to purchasers of nonfirm energy; and (5) that in the proceeding below the FERC departed from this precedent without explanation. Accordingly, in order to achieve a fair resolution of the issues underlying ratemaking by the BPA, review by this Court is imperative.

ARGUMENT

I.

THE COURT BELOW COMMITTED A CLEAR ERROR OF JUDGMENT IN CONCLUDING THAT, UNDER SECTION 7(k) OF THE PACIFIC NORTHWEST ACT, THE FERC LACKS AUTHORITY TO HOLD AN EVIDENTIARY HEARING WHEN REVIEWING RATES THE BPA CHARGES CALIFORNIA FOR NONFIRM ENERGY.

Respondents contend that the court below reasonably concluded that the FERC lacks authority under Section 7(k) of the Pacific Northwest Act to hold an evidentiary hearing when reviewing rates charged California by the BPA for nonfirm energy Opp. at 8. They fail to address, however, that any inquiry into the scope of the FERC's authority should have ended with the court's recognition that, in clear and unambiguous terms, Section 7(k) provides for just such a hearing:

> [A] literal reading of the last sentence of section 7(k) appears to allow an evidentiary hearing before the FERC, because the additional hearing section 7(k) provides for under the Federal Power Act is a de novo proceeding in which the FERC takes evidence.

App. at A-21; *see* Pet. at 9. As this Court has explained, "If the statute is clear and unambigu us, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361, 386 (1986), *quoting Chevron U.S.A., Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837, 842-842 (1984); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292 (1988).

Respondents cannot escape this result by arguing that an evidentiary hearing before the FERC is precluded by the additional requirement of Section 7(k) that the FERC's review be "based on" the record developed by the BPA. Opp. at 10; *see also* App. at A-18 to A-19. Even if it found Section 7(k) to be ambiguous, the court below could not reject the FERC's interpretation unless it were "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, supra, 467 U.S. at 844. Since it found that "the question is close and very difficult," however, it was not free to substitute its own construction. *See* App. at A-28. Moreover, by requiring the FERC to base its review on the BPA's record, Section 7(k) simply specifies the foundation for, not a limitation on, further analysis. If that record is inadequate, an additional evidentiary hearing before the FERC is an entirely logical way to resolve any matter in dispute. *See* 18 C.F.R. § 385.505.

Nonetheless, Respondents question how customers in California would be denied an impartial hearing if the FERC were not able to take additional evidence. Opp. at 11, n.8. They overlook, however, that the purpose of Congress in enacting Section 7(k) was to protect those customers against the BPA's well-recognized bias in favor of the Pacific Northwest. *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1113 (9th Cir. 1984). Toward this end, Congress expressly directed the FERC to review the rates the BPA charges them "in accordance with the procedures governing rates filed by public utilities pursuant to the Federal Power Act." *See Southern California Edison Co., v. FERC*, 770 F.2d 779, 784 (9th Cir. 1985). As explained in the legislative history of Section 7(k), but ignored by Respondents, "FERC's review will be based on the BPA record *and on any FERC proceeding*." H.R. Rep. No. 96-976, Part 1, 96th Cong., 2d Sess. at 70 (emphasis added); *see also* App. at A-23.

For similar reasons, Respondents' reliance on *United States v. City of Fulton*, 475 U.S. 657 (1986), is misplaced. *See* Opp. at 11. In that case, involving the Southwestern Power Administration, this Court noted in passing that, in reviewing rates established by federal Power Marketing Administrations ("PMAs") pursuant to Section 5 of the Flood Control Act of 1944, 16 U.S.C.

§ 825s, the practice of the FERC would be to remand the record for supplementation if necessary rather than conduct its own evidentiary hearing. 475 U.S. at 663. By contrast, with enactment of Section 7(k) of the Pacific Northwest Act, Congress has created an entirely separate process with respect to rates established by the BPA for the sale of nonfirm energy to California. *See Southern California Edison Co. v. FERC, supra,* 770 F.2d at 785-786.

Nor is any escape afforded Respondents by their contention that the FERC now agrees that it lacks authority to hold an evidentiary hearing, or even that this has been the BPA's position all along. Opp. at 9. In the first place, although this Court observed in *Aluminum Co. of America v. Central Lincoln Peoples' Utility District,* 467 U.S. 380, that the BPA's interpretation of the Pacific Northwest Act is to be given "great weight," an entirely different situation is presented in the case at hand. Here, the BPA is acting as a proprietary agency, whose rates charged for the sale of nonfirm energy outside the Pacific Northwest are subject to special review by the FERC. *See Central Lincoln Peoples' Utility District v. Johnson, supra,* 735 F.2d at 1113. Indeed, to allow the BPA freely to interpret the rules governing such review would be to nullify the protection Congress intended that California be provided.

Similarly undeserving of deference is the position announced by the FERC in a separate proceeding subsequent to the decision of the court below. As stated by this Court and acknowledged by Respondents (Opp. at p.10), "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fronseca,* 480 U.S. 421, 446, n.30 (1987), *quoting Watt v. Alaska,* 451 U.S. 259, 273 (1981). Moreover, the relevant inquiry here is not what is the new position of the FERC, but was the construction of Section 7(k) under review in the proceeding below impermissible? *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra,* 467 U.S. at 843. Because the court did not find it to be "manifestly contrary to the statute," the answer must be "no." *Id.* at 844.

II.

IN FAILING TO CONDUCT A CAREFUL AND SEARCHING REVIEW OF THE FERC'S DETERMINATION THAT CUSTOMERS IN CALIFORNIA SHOULD BE ASSIGNED THE BPA'S FULLY-ALLOCATED COSTS ON AN UNWEIGHTED, PROPORTIONAL BASIS IN THE RATES THEY PAY FOR NONFIRM ENERGY, THE COURT BELOW COMMITTED REVERSIBLE ERROR.

Respondents contend that the court below correctly determined that the FERC's approval of Schedules NF-1 and NF-2 was supported by substantial evidence. Opp. at 12. In making that determination, however, the court neglected to consider the whole record. Indeed, far from "tak[ing] into account whatever in the record fairly detract[ed] from its weight," the court merely adopted the FERC's findings and conclusions as its own. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Clearly, therefore, in failing to assess the evidence presented by both sides, the court "grossly misapplied" the standard of substantial evidence. *Id.* at 491; *see Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974).

Respondents attempt to shield this failure from review by this Court as a "fact-bound determination." *See* Opp. at 13. The fact is, however, that neither the FERC nor the Ninth Circuit made a serious effort to reconcile conflicting evidence in the record. For this reason, review by this Court, although properly the province — at least in the first instance — of the Court of Appeals, is necessary for a fair resolution of the factual issues underlying ratemaking by the BPA. *See Universal Camera Corp. v. NLRB*, *supra*, 340 U.S. at 490-491.

Respondents go on to admit "the fact that BPA decides whether to invest in *additional* generating capacity on the basis of anticipated demand in the Pacific Northwest region," but contest the implication "that BPA operates *existing* facilities solely for the benefit of customers in that region." Opp. at 13 (emphasis in original). The point is, however, that at no time will the BPA operate any such facility to insure the availability of nonfirm energy for its customers in California. Indeed, it is prohibited

from jeopardizing service to the Pacific Northwest in this way both through contractual agreement and by operation of law. *See Central Lincoln Peoples' Utility District v. Johnson, supra,* 735 F.2d at 1112.

Despite this, Respondents further contend that, because they benefit from the BPA's entire system, customers in California should be allocated a proportional share of the BPA's full costs. Opp. at 13. Not only do those customers have no claim on the BPA's capacity, however, but they must stand in line behind all others in receiving service from the BPA. *See* 16 U.S.C. § 839f(c). Moreover, even when it is offered for sale to California, nonfirm energy is at all times subject to interruption if later needed in the Pacific Northwest. *Id.*

Respondents' contention here is further undermined by earlier decisions of the FERC limiting the allocation of fixed costs to purchasers of nonfirm energy. In Opinion No. 250, the FERC cited various of its "decisions under the Federal Power Act . . . as useful guides in addressing the question of how properly to develop costs for [the BPA's] nonfirm energy rate determination." App. at C-39. In each instance, however, the FERC allowed the selling utility to recover at most only some portion of its fully-allocated costs from the sale of nonfirm energy. *See* Pet. at 15. Typical of these cases is *Illinois Power Company,* in which the FERC stated:

> [F]or reasons of equity, we believe that some capacity cost contribution, *which is significantly less than fully allocated capacity costs,* by customers for this [nonfirm] service is supportable.

11 FERC ¶61,186, p. 61,384 (1980) (emphasis added). Moreover, in a prior case involving the BPA, the FERC recognized that, as a "lesser quality product," nonfirm energy should be sold to California at a lower price than the "higher quality firm power sold within the [Pacific Northwest]." *U.S. Department of Energy, Bonneville Power Administration,* 23 FERC 61,342 at pp. 61,739-61,740 (1983) (involving rates established before passage of the Pacific Northwest Act, but applying the statutes enumerated in Section 7(k)).

Nowhere in Opinion No. 250, however, does the FERC explain why it departed from these decisions in approving the assignment of the BPA's fully-allocated costs on an unweighted, proportional basis to customers in California in the rates they pay for nonfirm energy. *See* Pet. at 16. For that matter, neither the court below nor Respondents in their opposition even address this unexplained departure from precedent. For this reason alone, the decision below must be reversed. *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983). As explained by this Court:

> [A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Id. at 42; *see also Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 807-808 (1973).

On a related subject, Respondents contend that, "[a]ccording to petitioner, the costs associated with [the facilities of the Washington Public Power Supply System ('WPPSS')] should not have been included in BPA's rates because [they] did not produce energy during the period at issue here." Opp. at 14. In truth, however, Petitioner's position is that these costs, like any of the BPA's costs, should be recovered from those customers for whose benefit they were incurred. *See* Pet. at 18. Because their construction was undertaken solely to serve firm load in the Pacific Northwest, therefore, these facilities should not be paid for by California. Moreover, as overlooked by both the FERC and the court below, and now by Respondents, recovering the costs of the WPPSS from customers in the Pacific Northwest would fully insure the ability of the BPA to repay the federal investment in its system. *See* App. at D-4; App. at A-28; Opp. at 14. Under Section 7(a)(2)(B) of the Pacific Northwest Act, costs not allocated to customers in California became the responsibility of those in the Pacific Northwest. *See Central Lincoln Peoples' Utility District v. Johnson*, *supra*, 735 F.2d at 1115.

As a final matter, Respondents contend that both the FERC and the court below found that Schedules NF-1 and NF-2, as

required by Section 7(k), encouraged the widespread use of nonfirm energy at the lowest possible price consistent with sound business principles. Opp. at 13-14. This requirement is not a series of empty words, however, but instead imposes on the FERC a serious obligation to review how the BPA allocates its costs and designs its rates. *Central Lincoln Peoples' Utility District v. Johnson, supra*, 735 F.2d at 1113-1115. Indeed, to ignore the purpose for which resources are installed in Pacific Northwest — and thus who actually caused their costs to be incurred — would be to render meaningless the special protection which Congress intended California be provided through enactment of Section 7(k). *See id.* at 1113. Having neither considered these factors nor explained its departure from well-established precedent, the FERC committed "a clear error of judgment" which should have been reversed. *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., supra*, 463 U.S. at 43; *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974). In turn, by adopting the FERC's findings and conclusions as its own without taking into account what in the record would have led logically to disapproval of Schedules NF-1 and NF-2, the court below failed to conduct a "searching and careful" inquiry, and its decision should now be reversed by this Court. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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